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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANTHONY G. BLEDIN et al.,

Cross-complainants and
Respondents,

v.

JASON SOLOMON KAY,

Cross-defendant and
Appellant.

B285852

(Los Angeles County
Super. Ct. No. SC122520)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Law Office of Joseph M. Kar and Joseph M. Kar for
Cross-defendant and Appellant.

Schiffer & Buus and Eric M. Schiffer for Cross-complainants
and Respondents.

Jason Solomon Kay appeals from an order denying his motion for attorney fees as costs of suit. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Kay was the president of Cardiodiagnostic Imaging Inc. (Cardio), which operated a radiology business in West Hollywood. Cardio leased its facility (the premises) from Mani Brothers Sunset Medical Tower, LLC (Mani), pursuant to a lease entered into in 2003 (the Cardio lease). The lease was terminated in October 2010 when Mani obtained a judgment against Cardio for unlawful detainer due to nonpayment of rent. Mani, however, permitted Cardio to remain in possession of the premises on a month-to-month basis while Cardio sought a buyer for the business.

In early 2011, Kay and Anthony G. Bledin, M.D., engaged in negotiations concerning the sale of Cardio's assets to Bledin or an entity owned by Bledin. The parties did not reach an agreement.

In August 2011, Virtual Radiology, LLC (Virtual Radiology), an entity owned by Bledin, entered into a lease with Mani for the premises (the Virtual Radiology lease), and began providing radiology services on the site under the name of Sunset Radiology. Kay thereafter worked for Sunset Radiology as an employee or independent contractor until 2013.

In May 2014, Cardio filed a complaint in the superior court against Bledin and Virtual Radiology.¹ Cardio alleged that the negotiations that took place in 2011 resulted in an agreement memorialized in a June 5, 2011 email from Bledin to Kay. According to Cardio: (1) Bledin agreed to fund a new corporation that would operate a radiology business at the premises; (2) Cardio

¹ The corporate entity, Anthony Bledin, M.D., Inc., was also a defendant. That entity is not a party in this appeal.

agreed to transfer to the new corporation certain equipment and the Cardio lease; and (3) Bledin and Kay would share in the ownership and profits of the new business. The June 5 email did not include any provision for the recovery of attorney fees in the event of litigation.

In its answer to the complaint, Bledin and Virtual Radiology asserted that “there was never a meeting of the minds and/or an enforceable contract between” the parties. In September 2015, they filed a first amended cross-complaint against Cardio and Kay, alleging causes of action for fraud, negligent misrepresentation, and breach of contract. They based the fraud and negligent misrepresentation causes of action on Kay’s allegedly false representations regarding the value of Cardio’s accounts receivables, Cardio’s ability to transfer title to its equipment free of liens, and the quality of Cardio’s equipment.

In their breach of contract cause of action, Bledin and Virtual Radiology alleged they had no contract with Kay but, “pleading in the alternative, if there ever was an enforceable contract,” the terms were not those set forth in the June 5 email, but in a document dated August 25, 2011. That document is attached as an exhibit to the cross-complaint. Its terms are similar, but not identical, to the terms in the June 5 email. Like the June 5 email, it does not include any provision for the recovery of attorney fees by any party. Kay and Cardio allegedly breached the agreement by failing to transfer the Cardio lease to Bledin and Virtual Radiology. Bledin and Virtual Radiology allege that they were thereby damaged because they ultimately entered into a new lease with higher rent. In the cross-complaint’s prayer for relief, Bledin and Virtual Radiology requested “costs,” but did not seek the recovery of attorney fees.

A bench trial began on November 7, 2016. After Cardio presented its case in chief on its complaint, the court granted

defense motions for judgment on Cardio's causes of action pursuant to Code of Civil Procedure section 631.8. Among other findings, the court found that the June 5 email "was not an enforceable contract," and that the parties had "merely [engaged in] a series of discussions, negotiations, proposals, and rejections."

Bledin and Virtual Radiology voluntarily dismissed their cross-complaint on March 2, 2017. On April 18, 2017, the court entered judgment for the defense on Cardio's complaint.² The judgment does not refer to the cross-complaint.

On June 23, 2017, Kay filed a motion for an award of \$352,790.50 for attorney fees as costs on the ground that he was the prevailing party on the cross-complaint and the recovery of his fees was authorized by contract. The contractual provisions Kay relied on are in the Cardio and Virtual Radiology leases. Those leases provide: "If either Landlord or Tenant should bring suit for the possession of the Premises, for the recovery of any sum due under this Lease, or because of the breach of any provision of this Lease or for any other relief against the other, then all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party therein shall be paid by the other party, which obligation on the part of the other party shall be deemed to have accrued on the date of the commencement of such action and shall be enforceable whether or not the action is prosecuted to judgment."

On August 22, 2017, the court denied Kay's motion, stating: (1) Kay cited no authority "that would allow for attorney's fees based on a voluntary dismissal of the [f]irst [a]mended

² In February 2019, we affirmed the judgment in an unpublished decision. (*Cardiodiagnostic Imaging Inc. v. Bledin et al.* (Feb. 1, 2019, B283020) [nonpub. opn.]) We take judicial notice of the record on appeal in that case.

[c]ross-complaint”; (2) “There is no contractual provision in this case [that] would support a claim for imposition of attorney’s fees in connection with the tort claims”; (3) “The lease agreements were not between . . . Kay and the [c]ross-complainants,” and “the provisions in the leases limit the recovery of fees”; and (4) “Kay is not entitled to recover fees as costs under [Code of Civil Procedure, s]ection 1032,” which “only allows recovery to the prevailing party.”

Kay timely appealed.³

DISCUSSION

Kay contends that the trial court erred in denying his motion for attorney fees as costs. Because he challenges the court’s determination that there was no legal basis for the award, we review the ruling de novo. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677; *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894.)

Under Code of Civil Procedure section 1032, a prevailing party in a civil action is generally entitled to his or her costs of suit. (*Id.*, subd. (b).) A prevailing party for this purpose includes “a defendant in whose favor a dismissal is entered.” (Code Civ. Proc., § 1032, subd. (a)(4); see *Santisas v. Goodin* (1998) 17 Cal.4th

³ Kay filed a request for judicial notice of a complaint filed by Kay against Bledin and Virtual Radiology in Los Angeles County Superior Court case No. BC568942, and a statutory offer to compromise in that action, which Kay accepted. Bledin and Virtual Radiology oppose the request on the ground of relevance, and point out that the documents were not before the trial court. We agree that the documents are irrelevant and therefore deny the request.

599, 606 (*Santisas*).)⁴ Costs include a party’s “[a]ttorney’s fees, when authorized by . . . [¶] . . . [c]ontract.” (Code Civ. Proc., § 1033.5, subd. (a)(10)(A).)

Civil Code section 1717, subdivision (a) provides for the recovery of reasonable attorney fees by the “prevailing party” “[i]n any action on a contract, where the contract specifically provides that attorney’s fees and costs . . . shall be awarded either to one of the parties or to the prevailing party.” Under subdivision (b)(2) of that section, “there shall be no prevailing party” when “an action has been voluntarily dismissed.” This latter provision arguably precludes a recovery of attorney fees by Kay, at least to the extent the cross-complaint is an “action on [the] contract,” because Bledin and Virtual Radiology “voluntarily dismissed” their cross-complaint after the court found in their favor on Cardio’s complaint. (Civ. Code, § 1717, subds. (a) & (b)(2).)

Kay contends, however, that Bledin and Virtual Radiology cannot rely on the voluntary dismissal bar to recovering his attorney fees because the trial court should not have permitted Bledin and Virtual Radiology to voluntarily dismiss their cross-complaint once trial had begun. Kay further contends that, even if the voluntary dismissal bar applies to the contract cause of action, the attorney fees provisions he relies upon authorize his recovery of fees incurred to defend against the tort causes of action. (See *Santisas*, *supra*, 17 Cal.4th at pp. 617, 619, 622–623.) We need not address these questions because even if they are answered

⁴ There is no dispute that Kay is a prevailing party on the cross-complaint for purposes of recovering his costs other than attorney fees. The court awarded Kay such costs in the amount of \$17,164.87, and neither side challenges that award or its amount.

favorably for Kay, he has failed to show that a recovery of attorney fees is authorized by contract.

Bledin and Virtual Radiology denied that any contract existed between them and Kay. Although they did allege a breach of contract cause of action in the alternative, the alleged contract does not include an attorney fees provision. In the absence of such a provision, Kay relies on the attorney fees provisions in the Cardio and Virtual Radiology leases. There are two problems with this reliance: Kay is not a party to either lease; and the attorney fees clauses in the leases do not encompass the claims asserted in the cross-complaint.

Kay attempts to overcome the fact that he is not a party to either lease by arguing that he “stands in the shoes” of a party to a lease. We reject this argument.

Courts have allowed attorney fees to be awarded in favor of, or against, nonsignatories to fee-authorizing contracts when the nonsignatory “‘stands in the shoes’ of one of the parties to the contract.” (See generally, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2019) Fee Awards Based on Contractual Fee Clauses, § 4.40, p. 4-27.) Stepping into another’s shoes for this purpose may occur in various ways. In *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, for example, a litigant who was a party to an agreement that provided for the recovery of attorney fees could recover fees from the nonsignatory opponent who was an assignee of a party to the contract and, as such, “stepped into [the contracting party’s] shoes as a matter of law.” (*Id.* at p. 605.) In *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, the court held that plaintiffs who had sued an insolvent insurance company with whom they had a fee-authorizing contract could recover their fees from the state insurance commissioner because the commissioner “step[ped] into the shoes” of the insurance

company when he was appointed its conservator. (*Id.* at p. 1245.) In *Employers Mutual Liability Ins. Co[.] v. Tutor-Saliba Corp.* (1998) 17 Cal.4th 632, an insurer that “stands in the shoes” of its insured as a subrogee to the insured’s contractual claims against a third party is bound by an attorney fees provision in the contract between the insured and the third party. (*Id.* at pp. 639–640.) And in *Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, a nonsignatory to a contract “stood in the shoes” of the signatory because it admitted it was formerly known as the signatory. (*Id.* at p. 1018.)

Kay states that he “should have been seen as standing in the shoes of Respondents [Bledin or Virtual Radiology] or Cardio for the purposes [of] the fee motion,” but does not explain this further. Nor does the assertion withstand scrutiny. Even if Kay stood in Cardio’s shoes with respect to Cardio’s lease, he would still need to show that either Bledin or Virtual Radiology stood in the shoes of the landlord (Mani) under the lease. There are, however, no facts suggesting such a relationship. The other alternative Kay suggests—that he stood in Bledin’s or Virtual Radiology’s shoes for purposes of the Virtual Radiology lease—is similarly without factual support.

Even if Kay and either Bledin or Virtual Radiology had stepped into the shoes of parties to a pertinent lease, Kay has not shown how the attorney fee provisions in the leases apply to the cross-complaint. Kay relies on the clause in the leases’ attorney fees provisions referring to lawsuits brought by the landlord or the tenant “for the possession of the [p]remises.” Virtual Radiology, he contends, “as the tenant taking possession of the premises, brought suit for possession held by Cardio and . . . Kay as its agent, for failing to deliver possession.” Neither Bledin nor Virtual Radiology, however, sued anyone for possession of the premises. Although the cross-complaint alleged that Cardio and

Kay breached the contract by failing to transfer Cardio's lease to the new corporation contemplated by the agreement, Bledin and Virtual Radiology sought only damages based upon the difference in the rent they would have paid if the Cardio lease had been transferred and the rent they were paying under the Virtual Radiology lease; possession of the premises was not an issue.

Kay also relies on a provision in the leases governing the tenant's liability to the landlord if the tenant fails to surrender the premises upon expiration of the lease.⁵ If that occurs and, as a result, the "succeeding tenant" asserts a claim against the landlord, the holdover tenant must defend and hold the landlord harmless from any loss, costs, or liability. Kay contends that he "stands in the shoes of the 'succeeding tenant'" within the meaning of this provision. His reliance on the provision is misplaced. The only possible "succeeding tenant" under our facts is Virtual Radiology—the tenant that succeeded Cardio as Mani's tenant in 2011. It is not clear from Kay's argument how he might have stood in Virtual Radiology's shoes or, if he did, how doing so supports his claim for attorney fees. Kay might have meant that he stands in the shoes of the prior tenant, Cardio. Even so, there is nothing in our record to suggest that Cardio wrongfully remained on the premises after Virtual Radiology's lease took effect or that

⁵ This provision states: "If Tenant fails to surrender the Premises upon the termination or expiration of this Lease, then in addition to any other liabilities to Landlord accruing therefrom, Tenant shall protect, defend, indemnify and hold Landlord harmless from all loss, costs (including reasonable attorneys' fees) and liability resulting from such failure, including, without limiting the generality of the foregoing, any claims made by any succeeding tenant founded upon such failure to surrender and any lost profits to Landlord resulting therefrom."

Virtual Radiology asserted any claim against Mani that Cardio had done so.

Kay also refers to a principle by which a defendant who is not a party to a contract may be entitled to recover fees under the contract when he or she prevails on the theory that there was no enforceable contract. (See, e.g., *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.) This rule is based on the rationale underlying Civil Code section 1717, which “was enacted to establish mutuality of remedy where contractual provision makes recovery of attorney’s fees available for only one party [citations], and to prevent oppressive use of one-sided attorney’s fees provisions. [Citation.] [¶] Its purposes require [Civil Code] section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney’s fees should he prevail in enforcing the contractual obligation against the defendant.” (*Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d at p. 128.) This rule does not apply here because Bledin and Virtual Radiology did not seek to recover attorney fees and would not have been entitled to recover their attorney fees if they had prevailed on their cross-complaint. There is, quite simply, no agreement that would have authorized such a recovery based on the claims they asserted.

Because there was no contractual authorization for the recovery of attorney fees on the contract or tort claims asserted in the cross-complaint, we affirm the order denying Kay’s motion for attorney fees.

DISPOSITION

The order dated August 22, 2017, denying Kay's motion for attorney fees is affirmed. Respondents Bledin and Virtual Radiology are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.